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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JOHN TAYLOR
KELLY TWOMEY, and
WAYNE LAFRANCE

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Is it reasonable to expect that film delivered to a photo finishing shop will be free from warrantless government seizure which lacks probable cause and exigent circumstances?

2. Does a conspiracy to distribute require an agreement among the conspirators to distribute to others outside of the conspiracy?

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners John Taylor, Kelly Twomey, and Wayne LaFrance request that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the First Circuit affirming their convictions in the United States District Court for the District of Maine of conspiracy to possess with intent to distribute marijuana.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in Appendix A ( ). The District Court opinion

denying the suppression motions is officially reported at 515 F. Supp. 1321, (D.Me. 1981), and is printed in Appendix B ( ).

JURISDICTION

The judgement of the court of appeals was issued on July 19, 1982. This Petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The pertinent statutory and constitutional provisions are: United States Constitution, Amendment IV, 21 U.S.C. §§841 (a)(1), 844 and 846. They are set out in full in Appendix C-F.

I. STATEMENT OF THE CASE

A. PHOTOGRAPHS

In the district court, Defendants-Appellants sought to suppress evidence seized from a vessel without a warrant and photographs seized by law enforcement officers without a warrant, probable cause or exigent circumstances. 1/ These motions were denied by the district court, see Appendix B, and affirmed by the First Circuit Court of Appeals, see, Appendix A.

There is little dispute as to the facts regarding the warrantless seizure of the photographs. Rolls of film jointly owned by the petitioners were delivered to a processing company in Massachusetts where three sets of prints were ordered, one for each petitioner. An employee was examining a test sheet depicting part of the photographs when a deputy of the local sheriff's office who was visiting the shop had his attention

1/ The search and seizure of evidence from the vessel do not merit review by the Supreme Court.

directed to them by the employee. The deputy observed a photograph of a man holding a shotgun. Examination of the prints caused him to think that they might depict "what could have been transportation of marijuana." He did not have any on-going investigation or case regarding marijuana at that time nor did he know or have reason to recognize anyone in the photographs. He told the employee to put the test sheet aside while he called his supervisor, Edward Woodfin. He requested that Woodfin examine the test sheet as he "thought it might have been something in connection with smuggling."

Woodfin arrived about ten to twenty minutes later, and examined the sheet. He ordered the employee to make an extra copy of the finished photographs for him although, at that time, he also had no knowledge of or involvement in any case or investigation involving anything like the events in the photographs and did not know anyone depicted in them. Woodfin waited around

the shop for twenty to thirty minutes and departed, returning later in the day for the copy he had ordered. The petitioners came for their copies the next day.

No warrant was sought for the seizure of the photographs although a magistrate empowered to issue search warrants was available only eight to ten minutes from the photo shop and the earliest petitioners were expected to return to the shop for their photographs was the next day.

There is no evidence that at the time of the seizure the sheriff's department was working on or had knowledge of an investigation or had any information of any kind regarding the vessel, the individuals or the events depicted in the photographs. There is nothing to indicate that the individuals depicted in the pictures were known to the police in any way at all or were suspected of any kind of crime. There is no evidence that the sheriff's office had any information of any kind pertaining to any smuggling activity in that area

at that time. According to their testimony, the deputies only suspected that they might have something. They had no facts creating probable cause. No charges were brought until a year or so later.

B. THE JURY INSTRUCTION

The petitioners were accused of being in league with others in a conspiracy whose purpose was alleged to be possession of marijuana with the intent to distribute it. At trial, the theory of the defense was that if there was a conspiracy, at most, its purpose was to possess marijuana within the conspiratorial group. The government introduced into evidence only four pounds of marijuana discovered on the shore in the vicinity of the petitioners' beached vessel. Three ounces were found on the boat itself. Although the conspiracy allegedly consisted of the three petitioners and diverse others, unknown, only three of the conspirators were on trial - the petitioners.

The government's position, that the jury could infer that a larger amount was involved, was based in part on the photographs of two or three packages. The defense position was that consideration of an amount of marijuana larger than actually seized was speculative because the photographs did not reveal the contents of the two or three bags and the photos did show an open cabin and passageway. The trial judge found that the trial evidence warranted a jury instruction on the lesser included offense of conspiracy to merely possess marijuana. He would not, however, instruct the jury that conspiracy to possess with intent to distribute meant an agreement by the conspirators to distribute outside of the conspiratorial group. His instruction did not distinguish between the conspiratorial group, comprising the petitioners and others, and individuals who were not in the conspiracy. The failure to make the distinction

for the jury between others in the conspiracy but not on trial and others not in the conspiracy prevented the jury from fairly considering the defense theory of the case, i.e., that evidence of transfers of marijuana among co-conspirators, including named and unnamed conspirators, as part of an agreement to possess for personal use did nto support a conviction of conspiracy to possess with intent to distribute. The intent to distribute had to be an intent to distribute outside of the conspiracy. There was no substantive charge of distribution in this indictment.

The trial judge did not give the defense theory to the jury; instead, he instructed them that if they found that defendants possessed a large amount of marijuana then they could infer that defendants intended to distribute it "to others." The defense objected to this instruction because it failed to adequately define "others." It did not

inform the jury that they had to find an agreement among all of the conspirators to distribute outside of the conspiratorial group. If the defendants and other conspirators were going to keep the marijuana among themselves, then their agreement or conspiracy was only to possess.

The instructions given probably confused the jury who could have easily believed that a transfer or distribution by the defendants to other conspirators was sufficient to establish a conspiracy to possess with intent to distribute.

The petitioners were found guilty of a conspiracy to possess with intent to distribute. On appeal, the failure to instruct the jury on the defense theory of the case was found not to constitute reversible error and their convictions were upheld.

REASONS FOR GRANTING THE WRIT

I.

This Court should determine whether or not prints from film submitted for processing are subject to governmental seizure without a warrant, probable cause or exigent circumstances.

The seizure of the photographs in this case presents an interesting twist to the old adage common in other histories that only the guilty need worry. The First Circuit has held at page 6 of its slip opinion that the police may seize prints made from any film brought by anyone to a photo finishing shop and that they do not need a warrant, probable cause or exigent circumstances to make such seizure. The only requirement is a suspicion that the prints could, at some time, be evidence used in a case and there need be no case or investigation underway at the time of the seizure.

The First Circuit's premises that plain view of the film by shop employees removes the owners privacy interest can logically be extended to include photo copy centers and print ships as well as photo developing establishments used by citizens and small businesses which cannot afford their own in-house facilities.

This decision conflicts with the prior decisions of this Court in such cases as Lo-Ji Sales, Inc. vs. New York, 442 U.S. 319 (1979) in which this Court held that a legitimate expectation of privacy against warrantless government seizure attached to property on display to the public for sale. The police in that case could not seize obscene material from a store which offered the items for sale even though they had probable cause. Their warrant was too general and a specific warant was required.

In McDonald v. United States, 334 U.S. 451(1968), this Court held that police who

observed illegal betting slips and gambling money needed a warrant to enter the premises and seize the illegal items. See also, Coolidge v. New Hampshire, 403 U.S. 443, 461-469 (1971). The Sixth Circuit Court of Appeals, in Clark v. Neil, 427 F.2d 1322 (6th Cir.1970), held that police could not seize a defendant's suit left for cleaning from the cleaning establishment without a warrant since there were no exigent circumstances even though there was probable cause. Two state supreme courts have made similar rulings. The Supreme Court of Rhode Island in State v. Farrell, R.I., 443 A. 2d 438 (1982), held that property given to a third person for a specific purpose, other than to confer common authority on that person, does not divest the owner of Fourth Amendment protection against

the seizure of that property. In State v. Sweatt, Me., 427 A.2d 940 (1981), the Supreme Court of Maine held that goods consigned to a store for sale could not be seized by the police from a public display without a warrant. In the case sub judice neither a warrant, probable cause nor exigent circumstances were found necessary by the First Circuit.

The First Circuit decision conflicts with the previous decision of this Court in Warden vs. Hayden, 387 U.S. 294 (1967), in which this Court held that the police need probable cause to believe that evidence they intend to seize would "aid in a particular apprehension or conviction." Id. at 307. Probable cause has been defined by this Court as meaning something more than mere suspicion. Brinegar v. United States, 338 U.S.

106,175(1949).

The Eighth Circuit Court of Appeals takes a different position than the First Circuit on this issue as can be found in United States v. House, 504 F.2d 1135 (8th Cir. 1979). In that case, photographs of an automobile were seized during a search pursuant to a warrant for narcotics. That seizure was not justified under the plain view exception because the incriminating nature of the photographs was not immediately apparent. The decision in this case also appears to conflict with a decision of the First Circuit which required probable cause for the seizure of mere evidence. United States v. Sheehan, 583 F.2d 30 (1st Cir. 1978). In Sheehan, the First Circuit held, at page 39, that "a legal premises search could not justify the photocopying of, say, diaries or correspondence observed during the completely unrelated to the objectives to the search."

More than mere suspicion that the evidence might be depicting what could have been a crime is necessary to seize the private property of another.

The Fourth Amendment was designed to protect people in their persons and affects and this Court ought not let modern technology be utilized as a device to skirt the intention of our Founding Fathers. It is not reasonable to let the police seize extra prints made from film sent in for processing or extra copies of documents sent to a photocopying center when they have no probable cause, there are no exigent circumstances, they have no case or investigation underway, and do not bother to obtain a warrant which is readily available.

II.

This Court should consider whether distribution by one co-conspirator to another establishes a distribution conspiracy.

The opinion below presents an opportunity for this Court to clarify the essential agreement which must be established to support a conviction for conspiracy to possess with intent to distribute (marijuana) and to differentiate between that and the lesser offense of conspiracy to merely possess. Cf. 21 U.S.C.§§841 (a)(1), 844 and 846.

Although the crime of conspiracy is "so vague that it almost defies definition," Krulewitch v. United States, 336 U.S. 440, 446 (1949), (Jackson J., concurring), this Court has often recognized the need to clarify the scope of conspiracy law. Cf. e.g., Braverman v. United States, 317 U.S. 49 (1942).

Petitioners who were indicted and convicted solely for conspiracy to possess with intent to distribute marijuana were denied a fair trial because the jury was not adequately informed of the elements

of the conspiracy charged. They were never told that transfers of marijuana among co-conspirators for their own personal use can not support a conviction of an agreement or conspiracy to possess with intent to distribute. Cf. United States v. Swiderski, 548 F. 2d 445 (2d Cir. 1977) [distribution between joint possessors for personal use insufficient to support conviction under 21 U.S.C. §841 (a) (1)] and Pinkerton v. United States, 328 U.S. 640 (1946) [the acts of one conspirator are imputed to the others e.g., possession by one is possession by all.]

After hearing the evidence at trial, the judge determined that the jury was entitled to consider the lesser-included offense of conspiracy to merely possess marijuana. Fed. R. Crim. P. 31 (c); Waker v. United States, 344 F. 2d 795, 797 (1st Cir. 1965). The instruction talked only in terms of the conspirators on trial and did not

address the agreement of the conspiratorial group as a whole. The government did present evidence of the existence of conspirators other than the defendants and aryued that the distribution by the defendants to others within the conspiracy established the groups purpose to be an intent to distribute. Mere distribution within the group does not establish the agreement to be intent to distribute since an agreement to merely possess would also require actual distribution within the group. A distinction should have been drawn between the intent of the conspirators as a whole rather than the defendants alone. It should have focused on whether the group's purpose was to have the marijuana for itself rather than focusing on the issue of a distribution within the group as being indicative of the group's purpose.

An instruction on the defense theory of the case would have informed the jury that a distribution conspiracy required

proof of an agreement among the conspirators to distribute marijuana to persons who were not members of the conspiracy. Failure to give such an instruction and the instruction, over defense objection, that evidence of any distribution by the defendants "to others" would support a conspiracy to distribute, allowed the jury to convict without finding the essential element that the conspirators' agreement was to distribute to persons outside of the conspiracy. There is a substantial likelihood that the jury was confused and believed that any transfer of marijuana - even from one conspirator to another - was sufficient to support a conviction for conspiracy to distribute.

As the Second Circuit recognized in United States v. Swiderski, supra, a transfer of contraband among joint possessors for personal use is not a distribution within

the meaning of 21 U.S.C. §841 (a)(1). Transfer of marijuana from some conspirators to other conspirators as part of an agreement to possess for their personal use does not support a conviction for conspiracy to possess with intent to distribute.

The court of Appeals did not say that the trial court was "clearly erroneous " in finding the evidence warranted jury consideration of a conspiracy to merely possess. See United States v. Prieskorn, 658 F.2d 631,638 (8th Cir. 1981). Since there was evidence to support the defense theory, a conspiracy to possess for personal use,2/ the jury should have been instructed that if it found that the petitioners and other

2/ The actual amount of marijuana seized was insubstantial. This was not a case where a conviction of a conspiracy to possess would have been inconsistent with the evidence See, United States v. Rodriguez, 585 F. 2d 1234, 1246 (5th Cir.), mod'd en banc, 612 F.2d 906, 908 n. 3 (5th Cir.1980).

conspirators did not intend to distribute to others outside the conspiracy, it could only convict of a conspiracy to possess.

Other circuit courts of appeal have held that the failure of a trial court to instruct the jury on a defendant's theory of the case, when supported by the evidence, is reversible error. See United States v. Prieskorn, supra, 658 F. 2d at 636.

It is apparent that the judgement of the First Circuit, like that of the trial court, confused the substantive distribution offense with the offense of conspiracy. More importantly, the court of appeals failed to follow applicable decisions of this Court which emphasize that the substantive offense and a conspiracy are different offenses, and requiring different proof.

It is well established that it is the agreement which constitutes the crime of conspiracy and distinguishes it from

substantive offenses. Braverman v. United States, supra, 317 U.S. at 53. It is not important that one conspirator gave marijuana to another for a conspiratorial purpose. What is important is what the group agreed to do. A conspiracy conviction in this case required proof that the conspirators agreed to distribute the controlled substance to "others" who were not members of the conspiratorial group. To hold otherwise, would be to eliminate the offense of conspiracy to possess because some transfer almost always occurs within a group whose only intent is to possess.

The agreement of the participants in a distribution, as opposed to a possession, conspiracy must be to distribute to persons outside of the group.

This concept has been implicity recognized in other federal circuits which have examined drug conspiracies. The Fifth Circuit

only recently held that a conspiracy may be found where "the evidence is adequate to demonstrate that all of the alleged co-conspirators directed their efforts towards the accomplishment of a single goal or common purpose." United States v. Elam, 678 F.2d 1234, 1245 (5th Cir. 1982). "Because the crime of conspiracy requires a concert of action among two or more persons for a common purpose, the mere agreement for one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction." United States v. Mancillas, 580 F. 2d 1301, 1307 (7th Cir. 1978); see United States v. Prieskorn, supra, 658 F.2d at 634. By implication, the agreement of the petitioners to deliver marijuana to confederates on shore does not support a conviction for conspiracy to possess with intent to distribute. When the confederates' only purpose is to gain

actual possession for the group there is "no joint objective of distribution." Id. citing United States v. Ford, 324 F. 2d 950, 952 (7th Cir. 1963).

If this Court examines the record, it will determine that petitioners were denied a fair trial by the denial of the requested instruction.3/

3/ It is also interesting for this Court to consider that the court of appeals apparently relied on Defendant Taylor's testimony at the suppression hearing when considering whether or not the evidence supported the defense instruction. This conflicts with the principle enunciated in Simmons v. United States, 390 U.S. 377 (1968), as utilized in Rakas v. Illinois, 339 U.S. 83 (1978), and Rawlings v. Kentucky, 448 U.S. 98 (1980), and might require this case be remanded to the court of appeals for reconsideration without the utilization of Taylor's testimony.

CONCLUSION

For the reasons cited, Petitioners request this Court to grant the writ requested herein.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 1982, three true and accurate copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit was mailed, first class, postage prepaid, to the Office the Solicitor General, Department of Justice, Washington D.C.

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